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Supreme Court, U.S.
FILED
No. _____
051458 APR 24 2006
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In the

Supreme Court of the United States

October Term, 2005

GEORGE WEBB,

Petitioner,

v.

LEVEL 3 COMMUNICATIONS, LLC,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), this Court held that in cases of employment discrimination, circumstantial evidence is admissible and probative of pretext and that other evidence of discriminatory animus is not required to survive summary judgment. Circumstantial evidence was accorded just as much weight in discrimination and retaliation cases as in any other kinds of cases in which summary judgment motions were considered. Summary judgment standards were no different for discrimination and retaliation cases than any other kinds of cases before the federal courts.

However, since *Reeves, supra*, certain appellate courts have created mechanisms to alter summary judgment standards in discrimination and retaliation cases. Hybrid summary judgment standards have been *de facto* created as appellate courts have established and now entrenched new tools of discounting plaintiffs' evidence. In doing so, discrimination and retaliation victims are being denied the typical means of proving pretext and are not being treated equally under the law in the summary judgment context.

QUESTIONS PRESENTED (cont'd)

The questions presented are:

Whether to prove pretext an employee can present *objective* evidence of his own qualifications and performance, including as compared to others outside the protected class, without having it discounted by the court as mere opinion.

Whether in selecting an employee for termination, a corporation's total deviation from announced criteria for reduction in force is sufficient to prove pretext.

Whether prior acts against plaintiff and in favor of others outside the protected class are relevant to prove pretext.

Whether subsequent acts against an employee after termination, such as denial of retirement benefits, are relevant to prove pretext.

Whether in a discrimination case, circumstantial evidence must be considered as a whole, not piecemeal, just as in any other case before the court.

Whether in a discrimination case, all reasonable inferences from the evidence should be drawn in favor of the non-movant.

QUESTIONS PRESENTED (cont'd)

Whether upon a summary judgment motion in a discrimination case, issues of credibility should not be explicitly or implicitly determined by the court.

Whether in a discrimination case, the court should conduct a sensitive inquiry as to evidence of discriminatory animus and pretext.

Whether an employer's decision to terminate an employee, which decision is substantially subjective, demonstrates pretext sufficiently to obviate summary judgment.

Whether a prima facie case of retaliation requires proof of a causal connection between the statutorily protected activity and the adverse action.

PARTIES TO THE PROCEEDING

There are no parents or subsidiaries known to petitioner.

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AN INCREASING NUMBER OF COURTS OF APPEALS ARE VIEWING CIRCUMSTANTIAL EVIDENCE IN A LIGHT MOST FAVORABLE TO THE MOVANT, IN VIOLATION OF SUMMARY JUDGMENT STANDARDS, THUS DENYING DISCRIMINATION VICTIMS EQUAL PROTECTION OF THE LAW.

AN INCREASING NUMBER OF COURTS OF APPEALS ARE DENYING DISCRIMINATION VICTIMS THE RIGHT TO PRESENT OBJECTIVE EVIDENCE OF THEIR OWN QUALIFICATIONS AND PERFORMANCE, INCLUDING AS COMPARED TO OTHERS OUTSIDE THE PROTECTED CLASS, WITHOUT HAVING IT DISCOUNTED BY THE COURT AS "MERE OPINION." HAVING ALREADY BEEN FIRED AND ISOLATED, DISCRIMINATION VICTIMS ARE THUS LEFT WITHOUT MEANS OF PROVING THEIR QUALIFICATIONS AND PERFORMANCE, WHILE AT THE SAME TIME THE COURTS ARE ACCEPTING SUBJECTIVE OPINIONS FROM THE COMPANIES THAT FIRED THEM.

AN INCREASING NUMBER OF COURTS OF APPEALS ARE MAKING CREDIBILITY DETERMINATIONS UPON MOTIONS FOR SUMMARY JUDGMENT IN DISCRIMINATION CASES, AND DOING SO ADVERSELY TO DISCRIMINATION VICTIMS.

DEVIATION FROM ANNOUNCED CRITERIA FOR REDUCTION IN FORCE SHOULD SUFFICE TO PROVE PRETEXT. IF NOT, THEN A COMPANY'S REDUCTION IN FORCE WILL ALWAYS INSULATE A DISCRIMINATORY TERMINATION AND DEFEAT A VALID CLAIM.

PRIOR ACTS AGAINST A DISCRIMINATION VICTIM SHOULD BE RELEVANT TO THE ISSUE OF PRETEXT IF THEY ARE LOGICALLY CONNECTED TO THE HARM ULTIMATELY SUFFERED BY THE EMPLOYEE.

SUBSEQUENT ACTS AGAINST AN EMPLOYEE AFTER TERMINATION, SUCH AS DENIAL OF RETIREMENT BENEFITS, SHOULD NOT BE *IPSO FACTO* IRRELEVANT MERELY BECAUSE SAID ACTS CAME AFTER TERMINATION. ALL CIRCUMSTANTIAL EVIDENCE OF ANIMUS AND PRETEXT SHOULD BE RELEVANT IN A DISCRIMINATION CASE.

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Petitioner George Webb ("petitioner" or "Webb") respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals was not reported, and is set forth at Appendix, pp. 1a-20a. The underlying opinion of the district court was not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623, provides as follows:

> It shall be unlawful for an employer-- (1) to . . . discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> . . . .

> (d) Opposition to unlawful practices . . . . It shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful by this section . . . .

STATEMENT OF THE CASE

A. Factual Background

On January 16, 2003, a Colorado corporation (Level 3) announced a reduction in force (RIF) and terminated an employee named George Webb, who was 60 years old. He had been the 54th employee hired in the new fiber optics communications company that now numbered about 2,000 employees. He had previously worked for 26 years at another communications corporation, and Level 3 hired him to tap into his expertise in a certain technical area. He was informed so by Level 3 and then worked an ensuing five years at his new job.

Level 3 was a young company both in terms of its own existence and in terms of the ages of its employees. In a prior case, the Tenth Circuit found as follows: "The workforce at Level 3 was primarily under forty." *See, Abuan v. Level (3) Communications, Inc.*, 353 F.3d 1158, 1165 (10th Cir. 2003). In *Abuan*, a jury finding of age discrimination was upheld upon evidence of a young work force with little senior oversight. Plaintiff himself had directly observed that the company was made up primarily of males in their 20s and 30s, and the number of employees older than that was in the low single digits.

This was an objectively observable fact. In the instant case, the Tenth Circuit found that, "Level 3's workforce is young." Appendix, at 8a-9a.

At the time of the RIF on January 16, 2003, the president of the company announced the criteria for selecting those employees to be terminated, as follows: (a) performance; (b) skills and qualifications; (c) tenure with the company. While plaintiff was terminated in the same RIF, upon investigation he learned that the criteria were not applied to him at all. If they had been, he could not have been selected. Instead, a human resources manager informed plaintiff that he had been terminated because his position had been eliminated. This directly contradicted the announced RIF criteria.

Upon further investigation, plaintiff learned that there had been eight other employees at the company with his same title, Program Manager II (which is a more advanced title than Program Manager). All were under 45 years old except for plaintiff, as disclosed by the RIF printout provided to him when he was terminated. Plaintiff was the 60-year-old on the RIF printout, and the only member of the "Affected Population" with the job title of Program Manager II to be terminated. He was also the only one of his peers in his unit terminated in the RIF, and he was the eldest of his peers. All of the above were objectively observable facts and not merely expressions of plaintiff's own opinion.

Among the employees not terminated in the RIF were several with whom plaintiff had directly worked and whose duties and performance he had directly observed. They were all under 40 years old and had been at the

company two or possibly three years. Plaintiff had worked there five years.

While working at the company, plaintiff's formal performance evaluations were excellent, i.e. "at or above" expectations. The company considered him to be the "most senior" member of his staff, and placed an unusually heavy workload on him according to the company's own written evaluations. He "performed tremendously," superiors wrote. He was also described in writing in the following way: "As the senior member of the team, my expectations for him were well higher than the other members of the team. George not only met those expectations, but exceeded them."

To the extent that any of the above characterizations of plaintiff's performance were subjective, they were made, not by plaintiff himself, but by the company managers above plaintiff. Thus they constitute strong evidence in a discrimination case, evidence that plaintiff was not only a senior member of the staff but a valued one who performed excellently with an unusually heavy workload being placed on him, and measuring up to standards that were higher for him than others.

Plaintiff had previously been transferred into his job as Program Manager II and believed such a transfer made him vulnerable to RIF termination. It is agreed that this was a subjective point of view. However, plaintiff's subjective prediction turned out to be true, which is an objective fact. When plaintiff was transferred to the job of Program Manager II, his prior job duties were not eliminated but were given, instead, to a younger employee. This objective fact was followed

by the further objective fact that, contrary to routine, the company then provided no planning for plaintiff's future career progression, as it did for other, younger employees. Plaintiff developed the subjective view that he had been made vulnerable to RIF termination, which turned out to be true (itself an objective fact).

During his career at the defendant corporation, plaintiff had observed favoritism toward younger employees, based upon the following objectively observable facts: Elsa Svensson, in her mid-30s, had had no prior experience in network development and no prior experience as a supervisor, as she readily conceded. Yet the company assigned her to supervise plaintiff and others in network development. These were objectively observable facts.

Plaintiff also observed that most of the peers who had joined the company after he had, were under 40 years old and had already been promoted to director-level jobs, while plaintiff had not been, despite longer tenure at the company and longer pertinent experience both at the company and in the industry. Ninety percent of plaintiff's peers, younger employees who had started at the company at the same time or after he did, had been promoted to director level or above. He named them; all were under 40; only one was older than his mid-30s. These employees were all in network development, where plaintiff worked with them. In learning their backgrounds, experience and tenures since they got out of college, plaintiff objectively recognized that ten younger employees who had already been promoted ahead of plaintiff had less experience in management, less experience in network development, less experience

in engineering and network construction activities (which is what everyone did on the job), and far less time in the industry (let alone in the working world in general since getting out of college). Since plaintiff was getting excellent performance reviews, this raised a concern. Plaintiff's concern was subjective, but the facts upon which it was based, as set forth above, were wholly objective. Knowing that Employee A has had only three years of work since getting out of college, according to that employee's own statements, while Employee B has 33 years, is not an opinion. It is an objective fact. Knowing that Employee A was hired at the company on a certain date, which date was two or three years after Employee B's hire date, is not an opinion. It is an objective fact. Plaintiff named the many employees whose comparative experience and tenure were markedly inferior to plaintiff's. It is an objective fact that those employees were promoted to director, while plaintiff was not.

Two of the employees under 40 years old mentioned above were promoted to become plaintiff's supervisors. Moreover, two of plaintiff's younger peers were moved into their jobs as recently as June 2002, and plaintiff helped train them for their jobs. Plaintiff was qualified for those jobs (based upon observing the job duties involved and knowing his own qualifications). These are objective facts from plaintiff's direct experience, observation and discussion with fellow employees about the duties they performed.

Rather than carp unprofessionally or let his performance suffer, plaintiff decided to register his concerns with the human resources department. On

November 14, 2002, he met with a corporate human resources representative, and, upon that representative's inquiry, plaintiff explained that there was evidence of age discrimination ("I believe a case could be made that I was discriminated against" because of age). Plaintiff also expressed to the human resources representative that he was being underutilized by a company dominated by younger males and that the company had a disproportionately low number of older males. The human resources representative took handwritten notes during plaintiff's discussion about discrimination, but said notes have never been found.

With regard to plaintiff's comments about discrimination, the company conducted no investigation. No one from human resources followed up at all to inquire further about the basis of plaintiff's comments, and the company would later explain that this was because plaintiff did not request an investigation.

Plaintiff's comments about discrimination to the human resources department were thus made in good faith, and he had a belief that they were protected against retaliation in any form.

Two months later, on January 16, 2003, plaintiff was terminated in the RIF. As discussed *supra*, plaintiff, at age 60, was the only Program Manager II impacted in the entire company, the only one of his peers in his unit terminated, and his selection for termination did not meet the RIF criteria announced by the company.

Well prior to the RIF termination, an employee named Pearce had been assigned to transition into

plaintiff's duties. This was explained to plaintiff by a manager above them. Plaintiff had been Pearce's "mentor" and "teacher," according to Pearce himself. Plaintiff had to teach Pearce what he needed to know in order to assume plaintiff's duties in the California market. Pearce had been in the industry far fewer years than plaintiff, and at the company fewer years, according to Pearce himself. Pearce was under 40 years old. The above are objective facts.

After his termination, plaintiff developed a belief, based upon the objective facts discussed *supra*, that the announced RIF criteria had been ignored in his own termination. So he asked in writing for a further explanation of the application of the RIF criteria to himself. The company failed to provide him with any elaboration of the RIF criteria nor with any comparisons, standards, or other delineation of objective application of the RIF criteria to him or anyone else.

In this litigation, the company was required to explain the basis of its actions pursuant to the discovery rules. The sole explanation for the RIF selection of plaintiff was completely subjective, coming from the "ultimate" decision-maker (named Leddy). His only pertinent statement of analysis was that, "I considered input from Mr. Webb's direct supervisor, Davetta Garcia." Leddy otherwise had no first-hand basis to select plaintiff to be terminated in the RIF. For her part, Garcia averred only that she weighed the number of accounts, "performance and job evaluations," "whether that individual was a player," "and what additional benefits that individual contributed to my group," among other [unnamed] things.

Neither Garcia -- nor any documentation in this case -- has ever set forth objective support for the above subjective opinions regarding plaintiff. The company has never provided any documents or other evidence of an objective comparison to support any of the above subjective opinions of a single manager as communicated to another manager (Garcia to Leddy). There has never been any delineation of the unknown method by which Garcia "ranked" the employees (as she claimed to have done), or even how she compared their performance and job evaluations (as she claimed to have done), let alone how she determined who was or was not "a player" and "what additional benefits that individual contributed to my group."

In sum, the selection of plaintiff to be terminated in the RIF went on inside the head of a single manager. It was a classically and totally subjective determination.

The Tenth Circuit had previously condemned such a *non*-process. In *Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1215-17 (10th Cir. 2002), the Tenth Circuit wrote (in reversing the trial court) that the defendant corporation, "offered virtually no evidence to support its characterization of the ranking system [that led to the challenged personnel action]. It presented no set of objective criteria by which employees are differentiated. In fact, nowhere in the record is it shown how rankings were determined in these meetings. Contrary to the district court's conclusion, on this record a jury could reasonably find that in the ranking process, the opinion of an employee's supervisor was the basis on which rank is established. . . . Courts view with skepticism

subjective evaluation methods such as the one here." [citations omitted]. Just as in *Garrett, supra*, in the instant case, "the opinion of an employee's supervisor was the basis on which rank is established." This process was condemned in *Garrett* (but not in the instant case, as will be discussed *infra*).

Upon terminating plaintiff, the decision-maker (Leddy) met with plaintiff in a room and spontaneously asked plaintiff if he thought he had been discriminated against. This question, coming without pre-suggestion from plaintiff in the face-to-face meeting, demonstrated that Leddy was well aware that plaintiff had been communicating his discrimination concerns to the human resources department. Leddy protested that he was unaware of such prior complaints, but his spontaneous question at the time of firing, combined with plaintiff's compelling proof of pretext in the selection of plaintiff to be terminated in the RIF, raised an issue of credibility for jury determination.

After plaintiff was terminated, the company advertised job openings for which he was qualified, including an opening specifically for "program manager." He read the requirements in the job advertisements, recognized that he fit them, applied for the jobs and never received a response, in violation of the company's own applicant procedures.

At the time of his termination in the RIF, plaintiff was eligible to retire. One of the options offered to RIFed employees, including plaintiff, was retirement if they qualified therefor (which plaintiff did). In pursuit of that option, plaintiff wrote to the company to ask

some questions in order to make a decision. Plaintiff pressed his inquiry regarding retirement, and a series of letters ensued. He wrote that, "I believe the termination was improper and the result of age discrimination" but wished to apply for retirement. The human resources department declined to process his retirement application, passing the request to the legal department, saying that it did so because plaintiff had hired a lawyer.

But the legal department refused to process the application, saying that plaintiff no longer worked for the company. This should have made no difference, as plaintiff, like all RIFed employees, was told that the option of retirement was available to him and this was patently at a point after all the RIFed employees had been terminated.

Plaintiff's application for retirement benefits was never processed by the company, and to the present he has been denied the right to retire.

In sum, the above are objectively observable facts.

B. Proceedings in the District Court

Plaintiff brought claims of age discrimination and retaliation in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq*.

After a period of discovery, the defendant corporation filed a motion for summary judgment, which the trial court granted in its entirety, dismissing the entire case.

Plaintiff then appealed to the Court of Appeals for the Tenth Circuit, which had jurisdiction pursuant to 28 U.S.C. § 1291.

C. Decision of the Court of Appeals

The Tenth Circuit ruled that the company did not dispute that plaintiff had set forth a prima facie case of age discrimination [Appendix, at 6a] but upheld the trial court in granting summary judgment and dismissing the entire case, ruling that plaintiff had not shown pretext. Appendix, at 16a and 20a. As to plaintiff's claim of retaliation, the Tenth Circuit ruled that the person who took the action against plaintiff (Leddy) was unaware of plaintiff's protected activity and therefore it did not matter how closely his termination followed his complaint of discrimination to the human resources department (and other evidence of retaliation was insufficient to establish a prima facie case of retaliation or, if so, pretext). Appendix, at 19a-20a.

With regard to the issue of pretext, the Tenth Circuit ruled that:

--Inconsistencies in the application of RIF criteria did not show pretext. Appendix, at 7a.

--The young age of the company's workforce ("Level 3's workforce is young.") is insufficient without more to raise an issue of pretext. Appendix, at 8a-9a.

--Plaintiff's comparison with younger employees treated more favorably was immaterial for summary judgment purposes because these comparisons were

merely expressions of plaintiff's own "opinion" and constituted only "vague generalities and speculation." Appendix, at 9a, 12a-13a.

--Prior acts against plaintiff were not tied to plaintiff's termination in the RIF and were therefore irrelevant to the issue of pretext. Appendix, at 10a.

--Post-termination acts, including failure to permit plaintiff to retire, were irrelevant to the issue of pretext because they occurred after plaintiff was terminated. Appendix, at 11a.

--Subjective decision-making "does not suffice to prove intentional discrimination." Appendix, at 13a.

--The decision to terminate plaintiff was in part objective and that defeats a showing of pretext. Appendix, at 13a-14a.

--After plaintiff's termination, his duties were divided up among other employees, and that defeats a showing of pretext. Appendix, at 15a.

--Plaintiff's allegation that placement in another position made him vulnerable for the ultimate RIF was mere "speculation." Appendix, at 15a-16a.

REASONS FOR GRANTING THE PETITION

I.

AN INCREASING NUMBER OF COURTS OF APPEALS ARE UPHOLDING PIECEMEAL ANALYSES OF PRETEXT AND ARE FAILING TO CONDUCT SENSITIVE INQUIRIES INTO THE ENTIRE ARRAY OF CIRCUMSTANTIAL EVIDENCE PRESENTED BY DISCRIMINATION VICTIMS. CIRCUMSTANTIAL EVIDENCE AS TO PRETEXT IN DISCRIMINATION CASES IS BEING WEIGHTED DIFFERENTLY THAN CIRCUMSTANTIAL EVIDENCE IN OTHER CIVIL CASES.

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AN INCREASING NUMBER OF COURTS OF APPEALS ARE DENYING DISCRIMINATION VICTIMS THE RIGHT TO PRESENT *OBJECTIVE* EVIDENCE OF THEIR OWN QUALIFICATIONS AND PERFORMANCE, INCLUDING AS COMPARED TO OTHERS OUTSIDE THE PROTECTED CLASS, WITHOUT HAVING IT DISCOUNTED BY THE COURT AS "MERE

OPINION." HAVING ALREADY BEEN FIRED AND ISOLATED, DISCRIMINATION VICTIMS ARE THUS LEFT WITHOUT MEANS OF PROVING THEIR QUALIFICATIONS AND PERFORMANCE, WHILE AT THE SAME TIME THE COURTS ARE ACCEPTING SUBJECTIVE OPINIONS FROM THE COMPANIES THAT FIRED THEM.

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PRIOR ACTS AGAINST A DISCRIMINATION VICTIM SHOULD BE RELEVANT TO THE ISSUE OF PRETEXT IF THEY ARE LOGICALLY CONNECTED TO THE HARM ULTIMATELY SUFFERED BY THE EMPLOYEE.

SUBSEQUENT ACTS AGAINST AN EMPLOYEE AFTER TERMINATION, SUCH AS DENIAL OF RETIREMENT BENEFITS, SHOULD NOT BE *IPSO FACTO* IRRELEVANT MERELY BECAUSE SAID ACTS CAME AFTER TERMINATION. ALL CIRCUMSTANTIAL EVIDENCE OF ANIMUS AND PRETEXT SHOULD BE RELEVANT IN A DISCRIMINATION CASE.

This petition presents a large number of issues, but they are all intertwined to demonstrate a trend to limit discrimination plaintiffs' rights to present circumstantial evidence in opposition to motions for summary judgment. The trend is to delimit evidence permitted by *Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) for a showing of pretext. The trend demonstrates increasingly divergent opinions of the courts of appeals and the development of a new summary judgment standard for discrimination victims -- not the same standard that applies to other civil cases involving circumstantial evidence. In that diverse respect, and with regard to the devices employed to dismiss a valid case of age discrimination herein, the opinion below conflicts with this Court's prior decisions and represents a *de facto* new summary judgment standard when circumstantial evidence of pretext is presented.

This is necessarily a fact-based petition, as that is the only way to seek review of such a degrading trend in the various standards for circumstantial evidence in discrimination cases. Reemphasizing the non-onerous

circumstantial proof of discrimination permitted by *Reeves*, *supra*, is necessarily a fact-based consideration.

The Eight and Ninth Circuits have taken it to the extreme with a heightened level of evidentiary proof being required to show pretext sufficient to avoid summary judgment. They have established a standard that a showing of pretext sufficient to obviate summary judgment can be made only by direct evidence or by "specific and substantial" or "substantial" circumstantial evidence. *See, Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1029 (9th Cir. 2006); *Bodett v. CoxCom, Inc.*, 366 F.3d 736, 743 (9th Cir. 2004); *Manatt v. Bank of America, NA*, 339 F.3d 792, 803 (9th Cir. 2003); *Stegall v. Citadel Broadcasting Co.*, 350 F.3d 1061, 1066 (9th Cir. 2003); *Bergene v. Salt River Project Agr. Imp. and Power Dist.*, 272 F.3d 1136, 1142, (9th Cir. 2001); *Godwin v. Hunt Wesson, Inc.* 150 F.3d 1217, 1222 (9th Cir. 1998); *Cherry v. Ritenour School Dist.*, 361 F.3d 474, 479 (8th Cir. 2004).

In the seminal case of *Godwin, supra*, at 1222, the Ninth Circuit established its own new evidentiary standard, thereafter followed in scores of lower court cases, as follows:

> In those cases where direct evidence is unavailable, however, the plaintiff may come forward with circumstantial evidence that tends to show that the employer's proffered motives were not the actual motives because they are inconsistent or otherwise not believable. Such evidence of "pretense" must be "specific" and "substantial" in order to create a triable issue

with respect to whether the employer intended to discriminate on the basis of sex.

Other courts, including the Tenth Circuit, have implicitly adopted a *de facto* higher level of circumstantial evidence required in discrimination cases, as in the instant case. Thus, plaintiff herein presented significant, multi-pronged circumstantial evidence of pretext only to have the court of appeals discount it totally by use of certain devices, as demonstrated in the following discussion:

The Tenth Circuit will not ordinarily accept as circumstantial evidence a discrimination victim's *objective* assessments of his own qualifications and performance, and the *objective* assessments of the qualifications and performance of comparators. The appellate court simply declares such evidence from the plaintiff to be inadmissible *opinion*. Thus, in the instant case, the plaintiff well-established (1) his own qualifications, *based upon his own direct knowledge of them*, (2) the qualifications of comparators, *who disclosed those qualifications to him*, (3) his own performance, *as expressed in performance evaluations by the company*, (4) the performance of comparators, *as he directly observed it on the job*, (5) his own long tenure at the company and in the industry, *based upon his own direct knowledge of it*, (6) the comparative short tenure of comparators both at the company (*observed directly by him*) and in the industry, *as disclosed by them to plaintiff*, (7) the fact that lesser qualified comparators were promoted to director, *as plaintiff directly observed it*, (8) the fact that plaintiff was not promoted to director,

based upon his own direct knowledge, (9) the fact that comparators whom plaintiff trained as they arrived at the company were promoted ahead of plaintiff, *based upon his own direct knowledge and observation*.

In summary fashion, the Tenth Circuit labeled this to be *opinion* evidence that does "not establish a material factual dispute on the issue of pretext." Appendix, at 9a. It added: "It is the manager's perception of the employee's performance that is relevant, not plaintiff's subjective evaluation of his [or her] relative performance." *Id.*

Such a generic discounting of eyewitness testimony *just because it comes from the plaintiff himself*, which rendition is being repeated in cases throughout the nation, demotes discrimination victims to second-class witnesses. An employee who knows his own work history (for example, 26 years with a prior company and five years with the instant company) and knows his own performance ratings as handed to him year after year by the instant company (for example, rated "at or above" at all times, given an unusually heavy workload and performing "tremendously" as the "most senior member" of the staff, as reflected in the company's own paperwork) surely can recount these facts as a matter of eyewitness testimony or testimony of what the company communicated directly to him in writing. This is objective evidence. To dismiss it out of hand as *mere opinion* is akin to dismissing the first-hand account of a Titanic passenger that the ship sank.

Likewise, an employee who has *directly observed* the performance and promotion history within the company

of comparators not in the protected class, and who has had said comparators recount their own histories of work and experience to him, can testify to said eyewitnessed events (and ear-witnessed words). An employee can testify that he was the only 60-year-old to be fired in the RIF when he was handed a RIF printout listing him there (and listing him as the only Program Manager II terminated in the entire company). And he can testify that he was the only employee in his entire unit who was fired in the RIF. Again, this is not opinion evidence. These are objective facts, including objective facts *prepared by the company*.

Petitioner concedes that the veracity of the decision-maker regarding his opinion of the plaintiff's performance is pertinent to the analysis of pretext. *See*, *Kendrick v. Penske Transp. Services, Inc.* 220 F.3d 1220, 1231 (10th Cir 2000). However, plaintiff's *actual* performance is relevant to determine if the decision-maker's opinion is accurate and believable. Credibility is always at issue, and the fact that plaintiff was actually performing well as reflected in the company's own documents (and in manager's words to plaintiff) is classically relevant to a determination of whether the decision-maker's explanation is suspicious, rife with mendacity and pretextual. An employer's manager can claim that he is terminating an employee because the employee was a poor performer, but that employee can challenge the credibility of such a determination by presenting objective evidence (known to the company) that he was a good performer, and therefore the manager's determination is, at a minimum, sufficiently suspicious to obviate summary judgment.

But the Tenth Circuit's declaration that such evidence, from the plaintiff's mouth, is mere opinion, removes from the plaintiff's arsenal one of the strongest weapons he has to prove pretext. Having been terminated from the company and escorted off the grounds, the playing field is left to the devices of the company, which controls all of the witnesses still on its payroll. And the court of appeals has roundly declared that the company's managers can express their opinions, even subjective opinions, as in the instant case. Plaintiffs must be reserved the opportunity to attack the logic or reasonableness of those subjective opinions of management and reserve the right to do so based upon plaintiffs' own *objective* recounting of performance and qualifications.

Similarly, the Tenth Circuit discounted such evidence even for use as background information leading up to the ultimate discriminatory acts. Thus, in the instant case, the appellate court simply declared that a pattern of prior wholesale favoritism toward younger employees, including a pattern of promoting lesser qualified comparators with less tenure at the company and in the industry (some soon after leaving college), was not relevant because such events could not "be connected to the employment action at issue." Appendix, at 9a. Such a demonstrated company bias is relevant to a closely following act of discrimination against yet another employee, especially when there patently are mechanisms at work that have caused the company to be "young," as the Tenth Circuit expressly found. Appendix, at 8a-9a.

There is no valid evidentiary reason, or reason of logic, or reason of business sense, why a discrimination victim's objective assessment of his own qualifications and performance should not be treated the same as assessments by management. To rule otherwise is to relegate discrimination victims to the status of second class witnesses (or non-witnesses) in their own cases.

For certain limited purposes, the Tenth Circuit has in the past credited an employee's testimony about his own performance even when disputed by the employer. *See, Kenworthy v. Conoco, Inc.*, 979 F.2d 1462, 1470 (10th Cir. 1992). However, that was only for the purpose of establishing a prima facie case of discrimination.

Subsequently, in *Furr v. Seagate*, 82 F.3d 980, 988 (10th Cir. 1996), the Tenth Circuit articulated a rule that an employee's own *subjective* evaluation of his own performance was valueless in the summary judgment context. Fair enough. But then, in 1999, the Tenth Circuit went further and adopted a rule of law previously created by the Seventh Circuit, that an employee's "own opinions about his performance or qualifications" do not "give rise to a material factual dispute." *See, Simms v. Oklahoma*, 165 F.3d 1321, 1329 (10th Cir. 1999) *cert. denied*, 528 U.S. 815, 120 S.Ct. 53, 145 L.Ed.2d 46 (1999), [*citing Rabinovitz v. Pena*, 89 F.3d 482, 487 (7th Cir. 1996)]. Without differentiating between an employee's subjective or objective opinions of his own performance and qualifications, that rule of law has now been cited in other courts as a reason to totally discount an employee's testimony. *See, inter alia, Lee v. GTE Florida, Inc.*, 226 F.3d 1249 (11th Cir. 2000); *Kess v. Municipal Employees Credit Union of Baltimore, Inc.*,

319 F.Supp.2d 637 (D. Md. 2004); *Cuenca v. University of Kansas*, 265 F.Supp.2d 1191 (D. Kan. 2003); *Gonzales v. American Family Life Assur. Co.*, 202 F.Supp.2d 1373 (M.D. Ga. 2002). Courts within the Tenth Circuit have cited the newfound rule of law in a myriad cases. Plaintiffs in discrimination cases simply are forbidden to present testimony, even objective testimony, of their own performance and qualifications. It is being struck as mere opinions.

This line of cases, and the decision in the instant case, run contrary to the teaching of *Reeves, supra*, that questions of fact are to be approached the same in discrimination cases as in other cases. *Id.*, at 148. "It therefore follows that, in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record." *Id.*, at 150. [emphasis added]. ". . . In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Id.*

Thus, as just one example among a dozen in this case, the Tenth Circuit was required to take as true that plaintiff had previously been evaluated by the company as "at or above" expectations. The company considered him to be the "most senior" member of his staff, and placed an unusually heavy workload on him according to the company's own written evaluations. He "performed tremendously," superiors wrote. He was also described in writing in the following way: "As the senior member of the team, my expectations for him were well higher than the other members of the team. George not only met those expectations, but exceeded them."

Furthermore, plaintiff's objective evidence as to his own qualifications, prior and present experiences, and his observations of the same in comparators (or discussions with them and their backgrounds and qualifications) should not have been discounted to zero as mere expressions of opinion. Indeed, in *Reeves, supra*, at 144-47, this Court found plaintiff's own rendition of his own observations in the workplace to be relevant in obviating summary judgment and did not declare them to be mere opinions, or otherwise useless for summary judgment purposes.

This "mere opinion" line of cases from the Tenth Circuit and from other circuits is a *de facto* variety of the new rule of law in two other circuits that pretext may be shown in discrimination cases only by "specific and substantial" or "more substantial" circumstantial evidence. *See, Cornwell, supra; Bodett, supra, Manatt, supra; Stegall, supra, Bergene, supra; Godwin, supra; and Cherry, supra.* This is an increased evidentiary burden and is akin to requiring "clear and convincing evidence," which is an entirely different, and more onerous, standard in the law.

Such an increased burden also cuts against the reality of discrimination cases, in which "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." *See, Reeves*, at 141. Such questions are "sensitive and difficult." *Id.* They do not deserve a tougher standard across the nation.

Instead, circumstantial evidence in discrimination cases should be treated the same as direct evidence, with no greater burden of production or required weight. As

this Court has ruled in another context, "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *See, e.g., Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 500, 508 n. 17, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957) [citing *The Robert Edwards,* 19 U.S. (6 Wheat.) 187, 190, 5 L.Ed. 238 (1821)]. Indeed, in *Reeves, supra*, at 134 and 150 this Court ruled that, upon a motion for summary judgment, the trial court was not to weigh the evidence at all.

Also indicative of the Tenth Circuit's rejection of circumstantial evidence, or at least the weighing thereof against plaintiff, was its determination that plaintiff's firing in contravention of the announced RIF criteria was insignificant. Appendix, at 7a. While the Tenth Circuit labeled these "minor inconsistencies in the application of RIF criteria," the company announced one set of criteria for selecting employees to be laid off (performance, skills, qualifications, tenure) and, when confronted with the notion that plaintiff didn't fit the criteria, informed plaintiff that he was being laid off, instead, for a different reason -- his job had been eliminated. To discount such powerful circumstantial evidence of pretext, the evidence was *weighed* by the Tenth Circuit, in violation of the tenets of *Reeves, supra*, at 134 and 150.

Other forms of circumstantial evidence were also weighed and discounted by the Tenth Circuit in this case, including the following: the background level of a workforce dominated by young people with little senior supervision; a prior reassignment of plaintiff to a job that made him more vulnerable to layoff; failure thereafter to

provide career planning typical for other, younger employees; comparatively better treatment of younger employees in multiple, specific ways proven by objective evidence; post-termination denial of retirement benefits, the fact that he was the only Program Manager II in the entire company and the only employee among his peers terminated in the RIF, a post-RIF job opening for Program Manager for which he did not even get an interview, and other circumstantial facts. The Tenth Circuit weighed and discounted these items of circumstantial evidence *piecemeal*, inadvertently missing the forest for the trees. Instead, all of the pieces of evidence (whether they be circumstantial or not) should have been weighed together, even if "none [was] conclusive in itself," creating a "convincing mosaic" of circumstantial evidence. *See, Walker v. Board of Regents of University of Wisconsin System*, 410 F.3d 387, 394 (7th Cir. 2005) [*citing, Kennedy v. Schoenberg, Fisher & Newman, Ltd.*, 140 F.3d 716, 723 (7th Cir.1998)].

This case and its announced conclusions suggest that the facts and their reasonable inferences were viewed in a light most favorable to the movant, instead of the other way around, as required by summary judgment procedure (even in discrimination cases). *See, Reeves*, at 149-50.

II.

SUBSTANTIALLY SUBJECTIVE DECISION-MAKING ADVERSE TO A DISCRIMINATION VICTIM SHOULD SUFFICE TO SHOW PRETEXT. IF NOT, THEN A COMPANY'S BALD STATEMENT OF OPINION AS TO THE BASIS OF AN ADVERSE ACTION WILL VITIATE LAWS FORBIDDING DISCRIMINATION.

In this case, the company proffered no documentation as to the *reasons* why plaintiff was selected to be terminated in the RIF. Instead, the company claimed (alternatively to the explanation that his job had been eliminated) that the selection of plaintiff was based upon the *opinion* of a manager who allegedly weighed the following: the number of accounts, "performance and job evaluations," "whether that individual was a player," "and what additional benefits that individual contributed to my group." The company never delineated any objective method or means by which the manager analyzed these factors, came to conclusions within these categories, or ranked the employees. Thus, the basis of plaintiff's selection for termination in the RIF remained totally subjective.

Nonetheless, the Tenth Circuit accepted the above as sufficient evidence to defeat plaintiff's circumstantial showing of pretext, which means that the Tenth Circuit, again, had to have weighed the evidence in contravention of *Reeves, supra*, at 134 and 150. The Tenth Circuit has thus drifted from its earlier tenet that subjective decision-making is an important consideration in pretext. *See, Garrett v. Hewlett-Packard Co.*, 305

F.3d 1210, 1217 (10th Cir. 2002) [Defendant corporation "offered virtually no evidence to support its characterization of the ranking system. It presented no set of objective criteria by which employees are differentiated. In fact, nowhere in the record is it shown how rankings were determined in these meetings. Contrary to the district court's conclusion, on this record a jury could reasonably find that in the ranking process, the opinion of an employee's supervisor was the basis on which rank is established. . . . Courts view with skepticism subjective evaluation methods such as the one here." [citations omitted].

This Court is urged to affirm the rule that totally or substantially subjective decision-making suffices to obviate summary judgment in a discrimination case. If not, then managers' undocumented and conclusory opinions will vitiate discrimination laws in the United States.

III.

A PRIMA FACIE CASE OF RETALIATION DOES NOT REQUIRE PROOF OF A CAUSAL CONNECTION BETWEEN THE STATUTORILY PROTECTED ACTIVITY AND THE ADVERSE ACTION.

A manager's cognizance of the plaintiff's protected action should not be required to establish a prima facie case of retaliation, as the Tenth Circuit required in this case. It is simple for the decision-maker to opine that he didn't know, and no one can get inside his head. Thus, it

should fairly be enough showing that it is *the company* that terminated plaintiff after *the company* became aware through its human resources department that plaintiff had engaged in protected conduct, i.e. complained to HR about discrimination.

As the Seventh Circuit has established, proof of a causal connection between the statutorily protected activity and the adverse employment action is not required to establish a prima facie case of retaliation. *See, Stone v. City of Indianapolis Pub. Utils. Div.*, 281 F.3d 640, 643-44 (7th Cir. 2002) [for a prima facie case of retaliation, no causal connection need be demonstrated; plaintiff need merely show that comparators who did not complain about discrimination did not suffer the adverse action. The company can defeat such a showing only by presenting "unrebutted evidence of a noninvidious reason for the adverse action . . . ."] [emphasis added].

In the instant case, the company's evidence of an innocent reason for firing plaintiff was fairly and roundly rebutted by the plaintiff. Thus, the Tenth Circuit should not have shortstopped plaintiff's establishment of a prima facie case of retaliation by requiring a causal connection to be shown.

Moreover, as a matter of proof in a retaliation case, the decision-maker's "ambiguous statements" suffice to obviate summary judgment. *See, Volovsek v. Wisconsin Dept. of Agr., Trade and Consumer*, 344 F.3d 680, 689 (7th Cir. 2003). At the time of his termination, plaintiff was spontaneously asked by the decision-maker if he believed he was being discriminated against. This

statement is at worst ambiguous under the above criteria. Contrary to the determination of the Tenth Circuit, when taken in a light most favorable to the plaintiff, said statement indicates that the speaker had already been tipped off about plaintiff's concerns regarding discrimination previously communicated to the human resources department. Thus, the speaker's knowledge of plaintiff's protected activity was demonstrated even if a causal connection was required to be shown.

This Court is respectfully requested to affirm the above requirements for establishment of a prima facie case of retaliation as well as for a showing of pretext in a retaliation case.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 24, 2006